

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE UNITED
MEXICAN STATES – SINGAPORE AGREEMENT ON THE PROMOTION AND
RECIPROCAL PROTECTION OF INVESTMENTS AND
THE UNCITRAL ARBITRATION RULES (2010)**

PACC OFFSHORE SERVICES HOLDINGS LTD

Claimant

and

UNITED MEXICAN STATES

Respondent

(ICSID Case No. UNCT/18/5)

Concurring and Dissenting Opinion of Professor W. Michael Reisman

Members of the Tribunal

Dr. Andrés Rigo Sureda, President
Prof. W. Michael Reisman, Arbitrator
Prof. Philippe Sands, Arbitrator

Secretary of the Tribunal

Ms. Mercedes Cordido-Freytes de Kurowski

A. Introduction

1. This case concerns a dispute between a Singaporean investor, PACC Offshore Services Holding LTD (“POSH”) and the United Mexican States (“Mexico”) under the Agreement between the Government of the United Mexican States and the Government of the Republic of Singapore on the Promotion and Reciprocal Protection of Investments, dated November 12, 2009 (the “BIT”). A tribunal instituted under the dispute resolution mechanism in Article 11 of the BIT must apply the BIT, not redraft it. I cannot concur with those parts of the Award which pick, choose, and, in effect, redraft provisions of the BIT.

2. Irrespective of the evidence produced by the Parties, which I believe supports key parts of the Claimant’s case, the Award employs, in my view, an impermissible methodology for treaty interpretation and application. The Award redrafts the BIT provisions, cherry-picking its language, and importing conditions from other treaties under cover of “concerns” couched in grand questions of arbitral policy, which go beyond the BIT and the dispute.

3. I will explain my position in three parts. First, the Award’s reasoning for excluding the treatment of OSA from the jurisdiction of the tribunal is mistaken and, in addition, creates a problematic precedent. Second, the Award redrafts the BIT’s provision on expropriation, transforming the objective standard of expropriation into a subjective analysis akin to denial of justice. Third, the Award’s damages calculation disregards the long-term effects of the Detention Order and its expropriative character.

B. The Treatment of OSA

4. It seems to me that if a State demands in its domestic law that a foreign investor must enter into a Joint Venture (JV) with a domestic party in order to conduct its business there, the State

may not shield itself from responsibility under the BIT for an injury to the investor, by claiming that it only acted against the domestic JV partner. If its treatment of the domestic JV partner under domestic law causes injury to the foreign investor, it must account to the investor for its actions in terms of fair and equitable treatment (FET) or full protection and security (FPS). That would not be the case when there was no requirement to joint venture with a national business and the investor decided to do so for its own strategic reasons, unless, however, the real target of the measure was the investor.

5. I have no quarrel with the Award's announcement that it "shares the concern expressed by the tribunal in *Methanex*", *i.e.*, that "A potentially endless chain of consequences may flow from any government decision or action, and it is necessary and reasonable to find some limit to the claims which can be brought under the Treaty".¹ Yet that is not the situation before the Tribunal. If, in this case where a JV was required under domestic law, the source of part of the foreign investor's injury derives from a violation of OSA's, the Mexican JV partner's, civil rights under Mexican law, then the derivative injury suffered by the foreign investor is proximate and should sound in the BIT.² I am persuaded that this is required by the BIT but the Award finds it, as a matter of law, too remote. Yet to reach this conclusion, the Award takes a term of the BIT out of its context and uses the interpretation of a similar term in NAFTA in a different context, to limit the term's application in the BIT. That is wrong.

¹ Award, ¶ 146.

² The OSA's consent decree for money laundering under U.S. law played a mischievous role in the arbitration. From time to time, it was raised with the clear implication that OSA was not entitled to due process in the Mexican proceedings, in which Mexican misfeasances ultimately led to the bankruptcy of OSA. To the extent that it made OSA's consent decree in another State's process the issue, as if a defendant in an unrelated criminal process which led to its bankruptcy is not entitled to due process, I think it impaired POSH's rights to due process.

6. The Award reaches its conclusion by selectively quoting from the BIT and from NAFTA (the latter as if it were part of the governing law). The Award compares NAFTA’s “relating to” and the BIT’s “by reason of, or arising out of” to contend that “both phrases convey the need for some direct connection between the contested measure and the loss claimed”. Concluding artfully that “[t]o hold that this difference is somehow significant risks drawing artificial distinctions between phrases which have the same substantive meaning”.³ That conclusion holds only if one ignores the rules of treaty interpretation and disregards the “context”, the respective instruments in which the terms appear: NAFTA and the BIT.

NAFTA Article 1101(1):

“1. This Chapter applies to **measures adopted or maintained** by a Party *relating to*:

- (a) **investors** of another Party;
- (b) **investments** of investors of another Party in the territory of the Party;
- and
- (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.”

BIT Article 11(2):

“An investor of a Contracting Party, on behalf of an enterprise legally constituted pursuant to the laws of the other Contracting Party that is a legal person such investor owns or controls, directly or indirectly, may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II, and that the enterprise has incurred **loss or damage** *by reason of, or arising out of,* that **breach.**”

7. While NAFTA uses the term “relating to” to connect “measures” and “investors” or “investments”, the BIT uses the term “by reason of, or arising out of” to connect “loss” and

³ Award, ¶ 146.

“breach”. That is ‘substantively’ different. There is nothing in the BIT to suggest that any “direct connection” or a “legally significant connection”, whatever either formulation is taken to mean, must exist between the “measure” and the “loss”, or the “measure” and the “investor”, as the Award states.⁴ By selectively quoting the provisions, the Award applies an interpretation of a term adopted in one context, *i.e.*, between a measure and an investor, to interpret a link between entirely different elements, the breach and the loss. But the Award circles back and concludes that the interpretation of a link between “loss” and “breach” is actually a link between “loss”, “investor”, and “measure”; examining the “relationship between the Claimant and its investment and the other measures”, excluding them because the Claimant was affected “only secondarily and indirectly, [] and not primarily”.⁵

8. BIT Article 11(2) is neither unusual, problematic, nor does it impose any special conditions. The fact that a claim by an investor must concern a loss which arises out of a breach of a treaty obligation by the host-State is the *raison d'être* of investment protection. Absent some special language to the contrary, it would be absurd to suggest that an investor may claim a loss *not* arising out of a treaty breach. But that does not justify somehow imposing a limitation on the link between the measure and the loss or the measure and the investor, as the Award does. Recall that the Vienna Convention requires terms to be interpreted in their “context”.

9. Moreover, the Award’s method undermines the principle of *effet utile*. The Award’s approach would drain the word “breach” of any meaning, equating it with the word “measure” used in NAFTA. But not every measure is a breach, and whether a measure, or to be precise, an

⁴ Award, ¶¶ 146-147.

⁵ Award, ¶ 147.

act attributable to the State under international law, is a breach of the treaty, depends on the substantive provisions of the BIT, such as Articles 4 and 6. Yet the Award fails to explain how *those* provisions require any degree of connection, primary or secondary, between the investor and the attributable act. Article 6 even uses the broad stipulation that expropriation may be effected “directly **or indirectly** through measures tantamount to expropriation”.⁶ Expropriation may thus *per se* be a secondary effect of an attributable act.

10. The Award thus mixes and matches between the terms of the BIT (which is binding on it) and of NAFTA (which is not binding on it). And it then goes even further afield by invoking the *Methanex* award, under NAFTA, as if it were authority for this case, under the BIT. The fact that the BIT provides that any claim must be based on a loss arising out of a treaty breach, cannot, as the Award decides, require a “legally significant connection” between the Claimant and the measures, not to mention any purported exclusion of measures which affect investors “only secondarily and indirectly”.⁷

11. According to the BIT there are thus two questions: (1) whether an act attributed to the State (*i.e.*, “measure”) breaches an obligation owed to an investor – which turns on the substantive provisions. If that is true, then the procedural question (2) is whether the loss claimed arose from that breach. The Award should not rewrite the BIT to alleviate its concerns, replace the word “breach” with “measure”, and somehow intertwine the term “investor” into what becomes an interpretational jigsaw puzzle. All that without explaining why the effect in question is not “legally significant”.

⁶ Mexico-Singapore BIT, Art. 6 [**Exhibit CL-1**] [emphasis added].

⁷ Award, ¶ 147.

12. To address the first question, the Award should have considered whether, if true, the alleged political persecution of OSA would have been a breach of Article 4 of the BIT. In other words, if proven, does a political persecution of the JV partner fulfil a host State's duty to provide a safe investment environment under FET or FPS? I believe it would not.

13. Yet even were one to follow the Award's concerns and rewrite the BIT, the Award's reasoning is detached from its own review of the facts. The Award makes several arguments to support its position that there is no connection between the measures against OSA and the Claimant. First that "if the Claimant had not contracted with OSA, it would be unaffected by the measures".⁸ Second, "the alleged losses [*i.e.*, those relating to the treatment of OSA] are entirely dependent on the fact that the Claimant happened to contract with OSA".⁹ And third, that "[t]here is nothing to distinguish the Claimant from other entities which may have contracted with OSA".¹⁰

But in its paragraph 57, the Award recognizes that:

"Respondent notes that POSH never had a shareholding or invested capital in OSA, and that the need for POSH to partner with a Mexican company was due to the 49% limitation prescribed in Mexico's Foreign Investment Law ("FIL" or "LIE") for foreign investment in maritime companies dedicated to the commercial exploitation of vessels for inland navigation and cabotage in Mexico."¹¹

14. The Award thus fails to appreciate that by forcing POSH to conduct its business through a JV with a domestic partner, Mexico exposed it to risks stemming from its actions against such domestic partners in comparison with other foreign investors allowed to engage in their business

⁸ Award, ¶ 147.

⁹ Award, ¶ 149.

¹⁰ Award, ¶ 149.

¹¹ Award, ¶ 57.

without domestic partners. By requiring investors to structure their investment in such a way as to become dependent upon domestic partners, Mexico's obligations under FET and FPS extend to cover the additional risks such dependence exposed the investor to. After requiring such investment structures, the Respondent cannot simply excuse itself from harm caused to the investor by claiming that the measure was directed against the Mexican partner; absent the FIL, there might not have been any Mexican partner whose, allegedly unlawful, persecution would have destroyed the investment.

15. In fact, the evidence shows that after the measures POSH tried to contract with PEMEX directly.¹² Whether, or how, such business relationship would have had to be structured under Mexican law is beside the point. It never happened because the investment was destroyed, but what is clear is that POSH engaged a Mexican JV partner, OSA, because of the requirements of domestic law. That is a fact the Respondent recognized and the Award itself recalls.

16. Whether it is called a "legally significant connection" or any other formulation, by first requiring JVs and then allegedly mistreating the domestic partner, Mexico had breached an obligation towards the investor (FET or FPS). The loss suffered by the investor is therefore "by reason of, or arising out of" Mexico's failure to properly apply its law towards the JV partner. The distinction between investors allowed to engage in business by themselves and those mandated to enter into JVs with local partners is normatively significant when it comes to the State's obligations with respect to investors and particularly the treatment of their JV partners. By demanding that investors expose themselves to its treatment of their domestic partners, a State may not claim that

¹² See, e.g., Email from J. Phang to G. Seow et al., April 11, 2014 [Exhibit C-299]; Email from J. Phang to G. Seow et al., July 18, 2014 [Exhibit C-130]; Email from J. Phang to G. Seow et al., August 20, 2014 [Exhibit C-188]; Email from J. Phang to G. Seow et al., April 1, 2014 [Exhibit C-187].

unlawful measures against the domestic partner are too remote from the investor to be considered a violation of an obligation owed to the investor. Mexico mandated the dependence of foreign investors in the maritime service industry upon a domestic partner and should have taken that into account when it went after OSA, a major such intermediary in the industry.

17. In contrast to the Award's conclusion there is thus much to "distinguish the Claimant from other entities which may have contracted with OSA".¹³ The Claimant contracted with OSA in compliance with a legal requirement which Mexican law imposed on it as a putative foreign investor in a particular industrial sector. The fact that when required by Mexico to choose a domestic JV partner, POSH "happened to" choose OSA, a major player at the time, does not excuse Mexico from responsibility to POSH for its injuries deriving from mistreatment of OSA. The Respondent, as is evident from this case, is well aware that it imposes such restrictions on foreign investors under its law and, thus, assumed a duty to have been aware of this when it decided to pursue a major such intermediary. Was Mexico unaware that by pursuing OSA, foreign investors would be affected? Its law mandated their exposure. Even if it was not intentional, at most Mexico did not concern itself with such effects.

18. Whether Mexico pursued OSA lawfully is beside the point for jurisdiction. The Award would allow a State to require JVs with domestic partners and then excuse it from destroying the investment by targeting "only" the JV partner. Thus, not only does the Award rewrite the BIT to impose conditions absent from it, but it then misapplies its own conditions.

19. Finally, the Award seems to consider that in order for the attributed acts which concern the treatment of OSA, *i.e.*, the Disqualification Order and the Attachment Order, to fall under the

¹³ Award, ¶ 149.

Tribunal's *ratione temporis* jurisdiction, the "three year limit" needs to be "extended".¹⁴ Yet that again is a misapplication of the BIT. The Award confuses the "measure", "breach", and "loss". Per the Award, the May 4, 2014 cut-off date concerns the date of the measure. In other words, for acts and events which occurred before that date, an extension is needed, either as a continuing or composite act.¹⁵ This rewrites the BIT.

20. Article 11(8) of the BIT, which prescribed the Tribunal's jurisdiction *ratione temporis*, provides a two-element test neither of which concerns the date of the measure:

"A dispute may be submitted to arbitration provided that the investor has delivered to the disputing Contracting Party its notice of intent referred to in Article 10 no later than three years from the date that either the investor, or the enterprise of the other Contracting Party that is a legal person that the investor owns or controls, directly or indirectly, first acquired or should have **first acquired knowledge of the alleged breach and knowledge that the investor or the enterprise has incurred loss or damage.**"

21. Thus, when it comes to the treatment of OSA, jurisdiction *ratione temporis* does not turn on the act itself but on (1) when the investor became aware that the treatment of OSA was unlawful and therefore a breach that sounded in the BIT, **and** (2) when it became aware that the breach caused it damage.

22. The Award seems to substitute the word "breach" with "measure" while completely disregarding the second condition, *i.e.*, knowledge of loss. The Award seems to assume that at the moment of the measure's adoption, POSH immediately knew that the measure was a breach of the treaty *and* that it immediately knew it had suffered loss or damage from the breach. Not only does

¹⁴ Award, ¶ 154.

¹⁵ Award, ¶¶ 153-154.

the Award fail to explain such an interpretation or assumption, but its assumption disregards the facts which the Award itself reviews.

23. On March 19, 2014, weeks after the measures were adopted, in an internal POSH email from Gerald Seow to Geoffrey Yeoh, it was stated that “In general, the management and staff of Pemex, and PEP recognise Posh’s good reputation, and that Posh is one of many victims of OSA’s mismanagement and criminal activities” and that “They are appreciative that POSH continues to keep the vessels operating and supporting Pemex production activities offshore, and requested that we continue to keep the vessels operating”.¹⁶ This email exchange indicates that POSH was not aware of any alleged wrongdoing by the Mexican Authorities with respect to the criminal prosecution of OSA. On the contrary, POSH continued in its operation and wanted to distance itself from what it *then* perceived as “OSA’s mismanagement and criminal activities”. This exchange alone indicates that the Award’s assumption that POSH considered the mere passing of the measures as creating “knowledge of the alleged breach” is incorrect. A review of POSH’s initial public offering dated April 17, 2014, also indicates that POSH did not consider that there was wrongdoing on part of the Mexican government in the investigation of OSA.¹⁷

24. It is unclear when POSH first became aware that the measures against OSA were, allegedly, politically motivated. The Senate Committee reports which made accusations of political persecution were only issued in 2015,¹⁸ and only in August 2014 did POSH’s internal

¹⁶ Email from G. Seow to G. Yeoh, March 19, 2014 [Exhibit C-186].

¹⁷ POSH Initial Public Offering Prospectus, April 17, 2014, pages 33-34 [Exhibit C-121] (e.g., “To the best of our knowledge, none of the vessels of our Group and GOSH are involved in the fraud allegations. None of our Directors and Executive Officers are involved in the fraud allegations.”).

¹⁸ Senate Special Commission for the Attention and Monitoring of Oceanografía, S.A. de C.V.’s case, 2015 Activities Report [Exhibit C-126]; PRD Report regarding the Senate Special Commission for the Attention and Monitoring of the Oceanografía, S.A. de C.V. case, dated 30 April 2015, [Exhibit C-135].

communication seem to reflect disenchantment with the decisions of the Mexican authorities.¹⁹ The Respondent provided no evidence that POSH became aware that the treatment of OSA was politically motivated before the Senate reports. But even assuming, *arguendo*, that POSH was aware of and believed contemporary media reports from March 4, 2014, about the persecution of OSA,²⁰ a supposition belied by its internal communication quoted above that came two weeks later, it would not suffice to deny jurisdiction, because Article 11(8) of the BIT provides for a second, cumulative requirement of “knowledge that the investor or the enterprise has incurred loss or damage”. Was the loss or damage suffered by POSH due to the alleged fact that OSA’s persecution was politically motivated known immediately? The record is clear that it was not.

25. POSH’s actions through March, April and May indicate that POSH only became aware of *any* damage or loss on May 16, 2014 or May 9, 2014 at the earliest.²¹ The Award fails to see the clear link between two of the facts it reviews. First, the Award recognizes that:

“During part of the Detention Order, GOSH’s Vessels remained operative servicing PEMEX, with PFSM having to assume the payment obligations OSA failed to meet. On May 16, 2014, GOSH withdrew the vessels from the GOSH Charters but did not recover the use of the vessels. The vessels remained inoperative during the rest of the Detention Order.”²²

And that:

“On May 2, 2014, SAE filed a writ with the Insolvency Court requesting to order PEMEX to make payments to SAE instead of the trusts. On May 6, 2014, the

¹⁹ Email from J. Phang to G. Seow et al., August 20, 2014 [Exhibit C-188] (“Marcia Fuentes is basically blackmailing us.”; “Especially since Marcia seems to be able to get the Bankruptcy Judge to approve all sorts of ridiculous Court Orders in the name of saving OSA”). A mistreatment could also be inferred from a May 12, 2014 email, but even that is after the critical date. *See* Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [Exhibit C-148].

²⁰ Claim, ¶ 119.

²¹ A May 12, 2014 email seems to be the first indication of POSH’s awareness of losses. *See* Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [Exhibit C-148].

²² Award, ¶ 91.

Insolvency Court ordered PEMEX to do so (the “**Diversión Order**”) and, on May 9, 2014, the Insolvency Court further clarified that the Diversión Order also applied to the Irrevocable Trust. The Order was confirmed on May 16, 2014, after Claimant’s and GOSH’s challenge.”

26. Until the confirmation of the Diversión Order’s application to POSH on May 16, 2014, POSH’s vessels continued to service PEMEX under the OSA contracts, assuming, based on SAE’s assurances,²³ that any payments were to be made to the Irrevocable Trust and to POSH as holder of the beneficial interest. POSH’s actions speak clearly. Once the payments were diverted, POSH became aware that it suffered damage and acted to minimize that damage by withdrawing the vessels. Yet even if POSH became aware of that damage when the May 9, 2014, order was issued, that date is still later than the May 4, 2014, cut-off date.

27. Contemporary documents support the Diversión Order as being the moment POSH became aware of damages as the Claimant explained.²⁴ In its prospectus to potential investors dated April 17, 2014, POSH lists potential risks to investment in its shares, including potential risks from its investment in Mexico. Yet risk is not knowledge of damage or loss. Obligated to be transparent with potential investors, POSH revealed risks and lack of assurances, but it is telling that POSH did not say it had suffered or expected, loss or damage, from these events in Mexico.²⁵ POSH listed the OSA related events as risks which “*could* adversely affect our financial condition and results of operations”. It is more likely that POSH was unaware of damage, rather than deceptive in its public offering. The moment POSH became aware of damages is clear from a May 12, 2014

²³ Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [Exhibit C-148].

²⁴ Reply, ¶¶ 414-420.

²⁵ POSH Initial Public Offering Prospectus, April 17, 2014, pages 33-34 [Exhibit C-121]; This can be contrasted with POSH’s subsequent listing of two incidents of contract termination “where revenue was affected by such termination”, for which it commenced arbitration. *Id.*, at pages 36-7.

correspondence. On that day, Gerald Seow wrote to Rogelio Granguillhome Morfin, concerning the Diversion Order, stating that “Under the SGX rules we are obliged to publish this news as it may have significant impact on our financial performance”.²⁶ Captain Seow explained the historical context and stated that:

“The payment rights of the 6 vessels had been assigned to an irrevocable Trust Account in 2013, and as such our revenue for these vessels should have been assured.

Unfortunately, unbeknownst to us, SAE requested the Third District Court hearing the bankruptcy proceedings to order Pemex Exploracion y Produccion ('PEP') to stop payment to the trusts of the collection rights over the PEP Contracts assigned by OSA to the Trust, and instead to pay directly to SAE/OSA under the grounds that the funds are required to effect payments to OSA's workers and to maintain the company in operation.”

28. Even though the Claimant raised this point in the Reply,²⁷ the Respondent provided no evidence that before May 4, 2014, POSH knew that the treatment of OSA was unlawful and thus a breach or that it suffered damage. Rather, in its Rejoinder, the Respondent insisted on treating the *ratione temporis* limitation as concerning the date of the measure.²⁸ The Award adopts the Respondent’s reading of Article 11(8), absent any support in the text of the BIT. In my opinion, the existence of evidence supporting POSH’s lack of knowledge and its contemporary actions indicate that the burden of proof in this case shifted to the Respondent, which failed to sustain it.

²⁶ Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [Exhibit C-148].

²⁷ Reply, ¶¶ 414-420.

²⁸ Rejoinder, ¶ 312.

29. I therefore dissent on the matter of jurisdiction and conclude that the tribunal had jurisdiction to consider the Respondent's treatment of OSA, and whether that treatment breached the obligation to provide FET to an investor in the bareboat charter industry.

C. The Irrevocable Trust

30. As with the question of jurisdiction, the Award grounds its decision concerning the Diversion Order not in the language of the BIT but in how it would have written the BIT given its concerns for the implications of its decision. Rather than applying Article 6 of the BIT on expropriation, the Award redrafts the provision, disguising the change as an interpretation of it. I cannot agree with the Award on this point.

31. The Award reviews the provisions of the BIT and the Articles on State Responsibility to suggest that “acts of the judiciary are not *per se* to be excluded from being treated as expropriatory in character”.²⁹ The interpolated words “*per se*” open the door to a modification of the applicable standard of expropriation. The Award continues that “The issue is what should be the standard to be applied in order to differentiate the role of an international arbitral tribunal in an investment arbitration from an appellate court of domestic courts’ decisions.”³⁰ The Award’s concern is that deciding whether a decision of a domestic court violated an international obligation of the State would place an international tribunal in the position of an “appellate court”. This concern leads the Award to redraft the provision on expropriation by artfully interpreting the provision by reference to Article 17.1 of the BIT. The Award reasoned that:

²⁹ Award, ¶ 227.

³⁰ *Id.*

“The standard described by the Claimant and Mexico in their references to the *dictum* of the *Eli Lilly* tribunal and to customary international law, respectively, converges around the necessity for the presence of unusual circumstances, situations of “*clear evidence of egregious and shocking conduct*” by the courts. The **Tribunal agrees with this standard, not as an added condition to expropriation under Article 6 but by placing this article in the context of the Treaty and in particular Article 17.1 of the Treaty.**”³¹

The aforementioned provision of the BIT provides that:

“A tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and *the applicable rules and principles of international law.*”

32. The reader discovers that, for the Award, the italicized words mean a selection of IIL awards, some antedating the BIT, which confine claims of expropriation by judicial organs to a narrower “denial of justice” standard.³² The Award’s reference to the decision and standard in *Eli Lilly* takes that award as revealed truth; like revealed truth, it is ambiguous. Consider the original passage from the decision in *Eli Lilly* from which the Award takes this standard:

“It will accordingly only be in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a NAFTA Chapter Eleven tribunal to assess such conduct against the obligations of the respondent State under **NAFTA Article 1105(1).**”³³

33. The standard taken from *Eli Lilly* was formulated to assess “conduct against the obligations of the respondent State under **NAFTA Article 1105(1)**”. But NAFTA Article 1105 is entitled “Minimum Standard of Treatment”, and Article 1105(1) relates to FET and FPS: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law,

³¹ Award, ¶ 229.

³² Award, ¶¶ 228-229.

³³ *Eli Lilly & Co. v. Canada*, ICSID Case No. UNCT/14/2, Final Award, ¶ 224 (Mar. 16, 2017).

including fair and equitable treatment and full protection and security.” Expropriation is in NAFTA Article 1110. The tribunal in *Eli Lilly* made a general comment that “NAFTA Article 1110(1)(c) includes the requirement that [] the nationalization or expropriation of an investment must be ‘in accordance with due process of law and Article 1105(1)’.”³⁴ And it added the obscure comment that “As regards decisions of the national judiciary, the interplay between obligations under NAFTA Articles 1105(1) and 1110 will be a matter for careful assessment in any given case, subject to the controlling appreciation that a NAFTA Chapter Eleven tribunal is not an appellate tier with a mandate to review the decisions of the national judiciary.”³⁵ The *Eli Lilly* tribunal declined to decide upon the various arguments of the parties on judicial expropriation,³⁶ limiting itself to these statements, and rejecting the case on the facts.³⁷ There is nothing here to indicate that the NAFTA tribunal considered that its standard for FET or FPS violations applies to a claim of expropriation.

34. Thus, per the Award, a standard set by a NAFTA tribunal to evaluate whether a State breached its obligation to provide investors with FET and FPS under NAFTA, is part of “the applicable rules and principles of international law” for assessing a claim of *expropriation* under the Mexico-Singapore BIT. In supporting its view, the Award only further muddles FET and expropriation, employing an interpretation method which literally detaches statements from their

³⁴ *Id.* at ¶ 225.

³⁵ *Id.* at ¶ 225. This seems to refer to a comment made in paragraph 221: “First, the judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility. As a matter of broad proposition, therefore, it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110. This said, the Tribunal emphasizes the point made below in respect of NAFTA Article 1105(1) that a NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of national judiciaries.” If *Eli Lilly* intended to be obscure, it more than achieved its intention.

³⁶ *Id.* at ¶ 220.

³⁷ *Id.* at ¶ 226.

context, and claims them to be “rules” or “principles” applicable in an entirely different context. In contrast to the Award’s apparent disclaimer, the Award not only adds, but in fact redrafts Article 6 of the BIT.

35. Moreover, in redrafting the provision and confining claims of expropriation by judicial organs to a standard akin to denial of justice, the Award does exactly what it professed to be concerned about. By transforming the objective standard of expropriation to the subjective standard of denial of justice, the Award was required, and it in fact performed, an in depth reconsideration of the decisions by the Mexican courts.³⁸ The Award evaluated the “purpose” of the Irrevocable Trust, concluding, in a sentence which I cannot follow, that “the evidence before the Tribunal makes it clear that when the Trust was established the financial situation of OSA was already precarious and the infusion of funds by the Claimant was intended to finance the debt of OSA to the Claimant.”³⁹ The Award then goes on to decide that the timing of the establishment of the Irrevocable Trust was “suspect”, in what seems to be a reference to the standard applicable under Mexican domestic law on insolvency,⁴⁰ concluding that “It is not surprising that the Third Collegiate Court concluded that the Trust and the assignment of rights were done during a dubious period.”⁴¹ Thus the Award’s redraft leads it to engage in precisely the role it wanted to avoid – “an appellate court of domestic courts’ decisions”.

36. The proper way to analyze the question of expropriation with respect to the Invex Trust was through the standard of expropriation applicable under the BIT’s Article 6. Judicial organs are

³⁸ Award, ¶¶ 231-243.

³⁹ Award, ¶ 240.

⁴⁰ Award, ¶ 242.

⁴¹ Award, ¶ 242.

organs of the State, and unless specifically excluded, their conduct may engage the State's responsibility for expropriation.⁴² That is so whether or not their decision applied domestic law correctly.⁴³ Were the Award to evaluate the diversion of the Irrevocable Trust payments under the standard of expropriation rather than denial of justice, there would have been no need to act as "an appellate court" and examine the validity of the Mexican courts' decisions under Mexican law. That is precisely the difference between the standards of expropriation and denial of justice, which the Award muddles.

i. The Standard of Expropriation Under the BIT

37. The Mexico-Singapore BIT prescribes a very broad asset-based definition of a protected "investment" and a broad, yet explicit, protection against what it defines as an unlawful "expropriation". With respect to expropriation, Article 6 of the BIT provides that:

"Neither Contracting Party may expropriate or nationalize **an investment** either **directly or indirectly** through **measures** tantamount to expropriation or nationalization (hereinafter referred to as "expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law; and
- (d) **on payment of compensation** in accordance with paragraph 2 below".

38. Article 6 does not exclude judicial measures, or subject them to a standard different than that of executive or legislative measures. A tribunal may not subject judicial measures to a standard

⁴² See, e.g., *Sistem Mühendislik İn aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, ¶ 118 (Sep. 9, 2009) ("That abrogation was effected by an organ of the Kyrgyz State, for which the Kyrgyz Republic is responsible. It is well established that the abrogation of contractual rights by a State, in the circumstances which obtained in this case, is tantamount to an expropriation of property by that State. The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree. If the Claimant has been deprived of its property rights by an act of the State, it is irrelevant whether the State itself took possession of those rights or otherwise benefited from the taking"). See further *id.* at ¶¶ 117 – 122.

⁴³ See further *infra*.

narrower than that in Article 6 or excuse expropriatory measures from the obligation to pay compensation because these were done in accordance with domestic law or with due process. In other words, under the BIT, the fulfilment of condition (c) (due process) cannot excuse a Party from fulfilling condition (d) (payment of compensation). Such an exercise would not only be inconsistent with the BIT but with general international law on State responsibility. The Award's reasoning allows the State to evade the strict standard of expropriation by modifying its domestic law to enable the executive to expropriate property through the courts, thus subjecting itself to a more lenient denial of justice standard.

39. This is part of a disquieting trend. Hamid Gharavi recently pointed out that the line of tribunals which infused standards from denial of justice as preconditions to judicial expropriation, on which the Award relies, exceeded their authority by rewriting their investment treaties and, moreover, created absurdities.⁴⁴ States write BITs and may agree on a rule which imposes stricter conditions on judicial expropriations or excludes them entirely; but that is not the rule applicable under this BIT. If the State-Parties to the BIT believe that judicial expropriations should be subjected to a higher standard, they should rewrite the BIT or provide for an authoritative joint interpretation per Article 17(2) of the BIT. Absent such amendment or interpretation, a tribunal is required to apply the standard in the BIT, not to impose a different standard, simply asserting it to be an “applicable rule or principle of international law”.

40. Based on SAE's request, in its May 9, 2014 decision, the Insolvency Court ordered that PEMEX divert the payments due to the Irrevocable Trust to the State's own accounts held by

⁴⁴ Hamid G. Gharavi, *Discord Over Judicial Expropriation*, 33 ICSID REV. 349 (2018).

SAE.⁴⁵ The Award subjects the legality and implication of this measure under international law to domestic law in contradiction to the rules governing State responsibility under international law.

41. Article 4 of the ILC's Articles on State Responsibility ("ASR"), which the Award quotes, explicitly provides that the conduct of judicial organs is attributable to the State:

"The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".

There is no exclusion or specific standard for attribution of judicial acts.

42. Even if, *arguendo*, the disputed decision of the Insolvency Court correctly applied domestic law, and that under domestic law, the court could lawfully take the investor's property and transfer it to the State, that is not a defense to an expropriation claim. As Article 3 of the Articles on State Responsibility provides: "The characterization of an act of a State as internationally wrongful is governed by international law. Such *characterization is not affected by the characterization of the same act as lawful by internal law.*"⁴⁶ The ILC Commentary made clear: "That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled." The ILC quoted a pertinent passage from *ELSI*:

"The question still remains, therefore, whether the requisition was or was not a violation of Article III, paragraph 2. This question arises irrespective of the position in municipal law. Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be

⁴⁵ Award, ¶ 97.

⁴⁶ UN Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001 Y.B. Int'l L. Commission, vol. II, Art. 3 [hereinafter ASR with Commentary].

lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.”⁴⁷

43. In an ITLOS case, Judge Rao pointed out that “it is well established that a State cannot take shelter behind a decision of any of its organs as an excuse for not implementing its international legal obligations”,⁴⁸ quoting the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia*, where it explained that:

“From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.”⁴⁹

The ASR rules make clear that, first, measures adopted by judicial organs are attributed to the State in the same way as those adopted by executive or legislative organs. Second, the rules of domestic law according to which a judicial organ may prescribe a measure cannot be raised to excuse the State from international responsibility over the effects of the measure on its international obligations. This has been pointed out by the Iran-US Claims Tribunal in *Oil Field v. Iran*:

⁴⁷ Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, 1989 I.C.J. Rep. 15, ¶ 73 (Jul. 20).

⁴⁸ The “ARA Libertad” Case (Argentina v. Ghana), Provisional Measures, ITLOS, Order of 15 Dec. 2012, Separate Opinion of Judge Rao, ¶ 6, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Rao_151212.pdf.

⁴⁹ *Certain German Interests in Polish Upper Silesia*, PCIJ, Merits, Judgment, 19 (May 25, 1926), https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf.

“It is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court.”⁵⁰

And the Ninth Edition of Oppenheim explains that there is no need for the attributable court’s decision to be irregular or wrong to find a violation of an international obligation:

“Even where there is no irregularity or error of procedure or law a decision by a court may still engage the international responsibility of the state: this would occur, for example, **where a judicial decision produces a result which is contrary to the state’s treaty obligation.**”⁵¹

44. The Respondent seems to have misunderstood the analysis of the tribunal in *Rumeli v. Kazakhstan*,⁵² which was properly grounded in the expropriation provision of the relevant BIT and not in standards foreign to it.⁵³ In *Rumeli*, although the decision of the domestic court was in due process and for a public purpose, the tribunal decided it was an unlawful expropriation due to the absence of adequate compensation (even though some compensation was given).⁵⁴

45. The Respondent selectively quoted from paragraph 704 of the award,⁵⁵ yet the tribunal only considered the instigation of the proceeding by the State to be relevant when the asset was transferred to a private party: “transfer to a third party may amount to an expropriation attributable

⁵⁰ *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran and National Iranian Oil Company*, IUSCT Case No. 43, Award, ¶ 42 (Oct. 8, 1986), reproduced in https://jsumundi.com/en/document/decision/en-oil-field-of-texas-inc-v-the-government-of-the-islamic-republic-of-iran-and-national-iranian-oil-company-award-award-no-258-43-1-sunday-10th-august-1986#decision_3911.

⁵¹ OPPENHEIM’S INTERNATIONAL LAW 545 (9th eds., 1992) [emphasis added].

⁵² Rejoinder, ¶ 389.

⁵³ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶¶ 698-706 (Jul. 29, 2008).

⁵⁴ *Id.* at ¶¶ 705-706.

⁵⁵ Rejoinder, ¶ 389 (“First, *Rumeli v. Kazakhstan* added the requirement that ‘the judicial process was instigated by the State’”).

to the State if the judicial process was instigated by the State.”⁵⁶ In the present case, the property of the investor was transferred to the State (SAE’s accounts), at the State’s (SAE’s) request. In any event, the *Rumeli* tribunal stated that the identity of the party was “no doubt a relevant consideration, although not in itself decisive, as has already been observed”.⁵⁷ Although in paragraph 707 of the *Rumeli* award the tribunal found the fact that the proceeding was initiated by the State to be important, it was not dispositive of the expropriation itself, which it had already concluded to have occurred, in paragraph 706, based solely on the expropriation provision.⁵⁸ This distinction is accurate because there is no requirement of illegality for a measure to be deemed expropriatory. Criticizing the *Saipem v. Bangladesh* tribunal’s reference to the illegality of the judicial conduct, Berk Demirkol commented that

“This reasoning does not seem fit. Conceptually, expropriation does not occur due to the illegal nature of any state measure, in this case, a court decision. It occurs because of the effects of the measure that substantially deprive the investor of the right, or the benefit attached to the right, that it legitimately holds. Conduct that has expropriatory effects need not bear an unlawful character”.⁵⁹

46. In the present case, I see no justification under the BIT to treat domestic courts differently when evaluating an expropriation claim. The Award’s approach is not only mistaken but creates an absurd situation. If, under Mexican law, SAE had the power to administratively instruct PEMEX to transfer payments for services from the Irrevocable Trust to itself, there would be no

⁵⁶ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 704 (Jul. 29, 2008).

⁵⁷ *Id.*

⁵⁸ *Id.* at ¶ 707 (“The Tribunal further holds that the fact that the expropriation was not directly for the benefit of the State but for the benefit of Telecom Invest does not affect this conclusion, since, as the parties agree, expropriation can exist despite there being no obvious benefit to the State concerned. In this connection the Tribunal does however consider that it is relevant that the court process which culminated in the expropriation was instigated by the decision of the State, acting through the Investment Committee, to terminate the Investment Contract.[.]”).

⁵⁹ BERK DEMIRKOL, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION 54 (2018).

special standard of misconduct and Mexican law would not be relevant or excuse the expropriatory act. But since SAE went through the Insolvency Court to achieve the same result, *presto* the State is protected as long as the deprivation was purportedly lawful under domestic law. This is reminiscent of the comment by the *Sistem v. Kyrgyzstan* tribunal that “The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree.”⁶⁰

47. Under the Award’s construction, all the State need do to evade the obligation to pay compensation for expropriation is to deprive a protected asset through a judicial procedure which “correctly” applies domestic law, itself a prerogative of the State. That contradicts the objective of the prohibition on expropriation and the rules on State responsibility. Moreover, such a construction places the investment tribunal in the place of an appellate authority considering whether the domestic law was accurately applied by the Court -- which the Award is ostensibly trying to avoid.

48. It is true that when “the rule of international law makes it relevant”,⁶¹ domestic law may become relevant to the application of the treaty rule. For instance, under the standard of the BIT, a qualifying “investment” must have been “established or acquired in accordance with the laws and regulations of the other Contracting Party”. Domestic law is thus pertinent to the question of whether an “asset” is a qualifying “investment” to the extent it was *acquired or established* in accordance with such domestic law, but not deprived in accordance with domestic law. There is nothing in Article 1 or Article 6 of the Mexico-Singapore BIT to indicate that the validity of an

⁶⁰ *Sistem Mühendislik İn aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, ¶ 118 (Sep. 9, 2009).

⁶¹ ASR with Commentary, *supra* note 46, at 38.

asset as a qualifying “investment” is conditioned upon the application of domestic law by a court, or that a court can deprive the asset and transfer it to the State without breaching the treaty’s standard for lawful expropriation as long as domestic law allows for such a transfer.

49. The pertinent question before the Tribunal, and one which does not require the Tribunal to act as an appellate court, is whether the decision was consistent with the State’s obligation under the BIT to compensate for expropriation, irrespective of its legality under domestic law or due process. The choice through which organ a measure against an investor is to be implemented cannot be dispositive of whether an expropriation has occurred nor can it alter the conditions for a lawful expropriation as prescribed by the BIT.

50. It may be true that in certain circumstances, a judicial decision which may be framed as an expropriation, should not be treated as such. For example, in *Saipem* although the tribunal recognized that the “most significant criterion to determine whether the disputed actions amount to indirect expropriation or are tantamount to expropriation is the impact of the measure” it cautioned that:

“[] given the very peculiar circumstances of the present interference, the Tribunal agrees with the parties that the substantial deprivation of Saipem’s ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts’ intervention is tantamount to an expropriation. If this were true, **any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds**”.⁶²

But that is not the case here, where a decision by a court transferred a protected asset of the investor, an eligible “investment”, to the State’s accounts.

⁶² Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, ¶ 133 (Jun. 30, 2009).

51. Under Article 6 of the BIT, there are thus three essential elements to the expropriation claim: (i) a qualifying “investment”; (ii) an attributable measure; and (iii) a payment of compensation. Whether the measure taken by the Mexican organ in question was done in accordance with domestic law or in due process is not dispositive when it comes to expropriation. In fact, as I explained, the legality of the measure under domestic law is immaterial and may not be raised as a defense to an internationally wrongful act. Because no compensation was paid, the Tribunal’s decision turns on whether POSH’s beneficial interest in the Trust was a qualifying investment and whether it was lost due to a measure attributable to Mexico. I believe the answers to both questions are affirmative.

ii. The Beneficial Interest is a Qualifying “Investment”

52. As I mentioned, the BIT provides for a broad asset-based definition of “investment”:

"investment" means an asset owned or controlled, directly or indirectly by investors of one Contracting Party and established or acquired in accordance with the laws and regulations of the other Contracting Party in whose Area the investment is made, and in particular includes:

- (a) an enterprise;
- (b) shares, stocks, and other forms of equity participation in an enterprise, or futures, options, and other derivatives;
- (c) bonds, debentures, and other debt securities of an enterprise:
 - (i) where the enterprise is an affiliate of the investor; or
 - (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a Contracting Party or an entity directly owned and controlled by a Contracting Party;
- (d) loans to an enterprise:**
 - (i) where the enterprise is an affiliate of the investor; or**
 - (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Contracting Party or an entity directly owned and controlled by a Contracting Party;**

[]

(h) claims to money involving the kind of interests set out in sub-paragraphs (a) to (g) above, but not claims to money that arise solely from:
(i) commercial contracts for the sale of goods or services by a national or enterprise in the Area of a Contracting Party to an enterprise in the Area of the other Contracting Party; or
(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than **a loan covered by sub-paragraph (d) above;**

53. The broad asset-based definition is “designed to protect as wide a range of investment forms as possible”.⁶³ UNCTAD explains that:

“[] the broad asset-based definition is dominant in the vast majority of IIAs and BITs and has been the subject of significant arbitral interpretation. It states, initially, that investment includes "every kind of asset", suggesting that the term **embraces everything of economic value, virtually without limitation.**”⁶⁴

54. Jeswald Salacuse has pointed out that “even if an alleged investment does not fall within any of the specified categories, it may still enjoy protection under the treaty if it qualifies as ‘an asset’”;⁶⁵ conversely, if a transaction does fall under the categories, its qualification as a protected investment is certain:

“The interpretational methodology followed by the tribunals in the cases indicated above seems straightforward: the tribunal first determines whether the transaction in question falls into one of the transactional categories specified in treaty provisions. If it does, then the tribunal concludes the challenged transaction is an ‘investment’ within the meaning of the treaty and is therefore entitled to treaty protection.”⁶⁶

⁶³ JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 212 (3rd ed., 2021).

⁶⁴ UNCTAD, *SCOPE AND DEFINITION* 24 (2011), https://unctad.org/en/Docs/diaeia20102_en.pdf [emphasis added].

⁶⁵ SALACUSE, *supra* note 63, at 212.

⁶⁶ *Id.* at 213. The second approach discussed by Salacuse concerns the *Salini* test, which does not apply in this case. In addition, as he explains, the broad category of “claims to money”, was intended to “broaden the scope of what one would traditionally consider to be an ‘asset’”. *Id.* at 212.

55. It is a long-standing principle of international law that when interests are separated between beneficial interest holders and holders of formal, legal title, the protected interest under international law is the beneficial interest, rather than that of the nominal titleholder. For example, the decision of the US Foreign Claims Settlement Commission in *American Security and Trust Company* explained:

“It is clear that the national character of a claim must be tested by the nationality of the individual holding a **beneficial interest** therein rather than by the nationality of the nominal or record holder of the claim. Precedents for the foregoing well established proposition are so numerous that it is not deemed necessary to document it with a long list of authorities . . .”⁶⁷

56. Similarly, *In the Matter of the Claim of Richard O. Graw*, the claims commission again emphasized that it was the person holding the “beneficial interest” that was protected under international law:

“[I]t has been held by this Commission, in other claims programs, that the national character of a claim must be tested by the nationality of the individuals **holding a beneficial interest** therein rather than by the nationality of the nominal or record holder of the claim.”⁶⁸

57. In his work on the diplomatic protection of citizens abroad in 1919, Professor Borchard explained that “the Department of State in its diplomatic support of claims looks to the citizenship of the real or equitable owner of the claim as distinguished from the nominal or ostensible owner appears from the sections on corporations, administrators and assignees”. As Borchard went on

⁶⁷ 26 ILR (1957), 322, 322.

⁶⁸ *In the Matter of the Claim of Richard O. Graw, Executor of the Estate of Oscar Meyer, Deceased*, Proposed Decision, U.S. Foreign Claims Settlement Commission, Decision No. PO-8583, Aug. 25, 1965, at 1-2, *upheld by* Final Decision, Sept. 20, 1965.

to explain, the State Department protects persons with “special or derivative rights [] although the record title may have been vested in an alien”.⁶⁹

58. *Blue Bank v. Venezuela* is a recent decision emphasizing the proposition that international law prefers the party with the beneficial interest rather than the nominal titleholder. Although in that case the beneficiary was also the protector, the tribunal’s decision seems to have been guided by the enjoyment of the proceeds of the trust rather than any control over it:

“The party that would come closest to satisfying the requirements of ‘ownership’ with regard to the assets of the Qatar Trust is what the trust deeds refer to as the ‘Eligible Person’ (which is not a term of art but one that the Tribunal - for reasons given in paragraphs 190 to 194 below - considers to be a beneficiary). It is the ‘Eligible Person’, in this case Hampton, that enjoys ultimate control over the trust asset and that will ultimately enjoy or suffer, as the case may be, the fortunes of the trust assets.”⁷⁰

59. Similarly, in *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, the tribunal explained that under international law the fundamental realities are preferred to legal formalities, thus protecting the party holding the “beneficial interest” rather than the legal interest:

“[I]nternational law does not tend to permit formalities to triumph over fundamental realities. By way of example, in the field of diplomatic protection (which may, depending upon the issue, be relevant to the interpretation of a BIT), when claims commissions and arbitral tribunals have determined whether it is a person who holds the legal interest as opposed to **a person who holds the beneficial interest** in shares that is entitled to seek diplomatic protection, they have consistently found that it is the beneficial interest which is deserving of protection.”⁷¹

⁶⁹ EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 643 (1919).

⁷⁰ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, *Award*, ¶ 170 (Apr. 22, 2017).

⁷¹ *Perenco Ecuador Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, *Decision on Remaining Issues of Jurisdiction and Liability*, ¶ 522 (Sep. 12, 2014) [emphasis added].

60. Under the terms of the BIT, POSH's beneficial interests under the Invex Trust were a qualifying investment. There is no indication that the Invex Trust was not "established or acquired in accordance with the laws and regulations of the other Contracting Party". All the necessary procedures, including with the State-owned PEMEX, were fulfilled, and POSH's beneficial interest in an irrevocable trust was solidified. The fact that such structure was a prominent feature with other entities engaged with OSA indicates its legality under domestic law. A trust structure was considered as part of the original Banamex financing⁷² and it has not been proven that it was established to defraud anyone.

61. POSH's beneficial interest was clearly a "claim[] to money involving the kind of interests set out" in paragraph (d) "loans to an enterprise", which is an affiliate of the investor. POSH secured the beneficial interest in an irrevocable trust to which the collection rights were assigned to protect POSH's loan to the JVs for the purchase of the vessels. Under the BIT, such beneficial interest is a protected "investment", whose deprivation would constitute an expropriation. As the beneficial interest in the trust fits neatly into one of the BIT's examples, it must be treated as a protected investment.

62. Yet even if, *arguendo*, one were to apply the *Salini* test, the beneficial interest fulfils the conditions of contribution, duration, and risk. The loan made by POSH, which was to be protected by the trust, was a significant contribution. The beneficial interest was intended to remain a claim to money for the duration of the loan repayment. And finally, as the claim to money was attached to the actual provision of services to PEMEX, it entailed risk.

⁷² Minutes of the 8th Board of Directors meeting of PACC Offshore Services Holdings Pte. Ltd., August 18, 2011 [Exhibit C-40].

63. Following the terms of the BIT and not domestic law, as the Award should have, leads to the conclusion that POSH's beneficial interest in the Invex Trust is an independent, protected, "investment" under the terms of the BIT. POSH was the lawful, beneficial owner, of any receivables from the PEMEX contracts, less any mandatory distributions as part of the Invex Trust, *e.g.*, OSA's commission.⁷³

64. The Award recognizes that the Respondent, through its organ SAE, requested that another one of its organs, the insolvency court, instruct the Respondent's State-owned entity PEMEX, to divert payments from the Irrevocable Trust, to the Respondent's accounts held under its organ, SAE:

"On May 2, 2014, SAE filed a writ with the Insolvency Court requesting to order PEMEX to make payments to SAE instead of the trusts. On May 6, 2014, the Insolvency Court ordered PEMEX to do so (the "Diversion Order") and, on May 9, 2014, the Insolvency Court further clarified that the Diversion Order also applied to the Irrevocable Trust. The Order was confirmed on May 16, 2014, after Claimant's and GOSH's challenge".⁷⁴

65. In this decision, an organ of the Respondent effectively deprived POSH of its claim to money under the Irrevocable Trust and transferred the economic value of the protected investment to another organ of the Respondent. Whether this decision was lawful under domestic law, or, as Claimant argued, misapplied the law in effect,⁷⁵ is not dispositive. The only pertinent question under Article 6 of the BIT, is whether a measure attributable to the Respondent, directly or indirectly, expropriated a protected investment. Having explained why, in contrast to the reasoning

⁷³ Moreover, taking account of the realities of the investment leads to the conclusion that the receivables from the PEMEX contracts were never intended to be OSA's property. OSA, as the intermediary, was only entitled to its commission which was secured through the Invex Trust. Treating the entire receivables from PEMEX as OSA's property thus disregards the rationale and structure of the investment and the business relationship.

⁷⁴ Award, ¶ 97.

⁷⁵ Reply, ¶¶ 251 – 300.

of the Award, the standard of denial of justice is inapplicable to expropriation, I believe the conditions of Article 6 of the BIT are fulfilled.

66. As against the suggestion in the Award, this conclusion is the opposite of an investment tribunal acting as an appellate court. The BIT in this case is clear. Where it comes to expropriation, an investment tribunal must conduct an objective analysis evaluating the facts of the case and whether an attributable act fulfilled the requisites of an expropriation. Such an objective standard, in contrast to denial of justice, refrains from conducting, in effect, appellate review and scrutinizing the substance of decisions by domestic courts. Redrafting the provision by importing purported “rules” or “principles” of international law to alter the applicable standard, the Award infuses foreign considerations into the analysis, transforming itself into an appellate court.

67. As I explained, the proper analysis disregards questions of legality under domestic law, focusing rather on whether the attributable act constitutes a breach of an obligation assumed by the Respondent State. By proactively attracting foreign investors by means of a BIT, States assume certain obligations with respect to the treatment of investors and their property. It is therefore understandable why, unless specified differently in the treaty, a host-State may not shield itself from responsibility for harm to investors by hiding behind the provisions of domestic law as applied by its organs. The Award, in effect, transforms a standard provision on the prohibition of expropriation without compensation into a hyper-charged Calvo clause. Per the Award, if a domestic court takes an asset and transfers it to the State in accordance with its interpretation and application of domestic law, (which can extend to changing the applicable law,) the case is closed for the investor unless there was a denial of justice. Manifestly, this is not the standard of expropriation under the BIT in this case and it muddles the different applicable standards. I

therefore dissent on this point, and would have concluded that the Respondent expropriated the Claimant's beneficial interest in the Irrevocable Trust.

D. The Detention Order was an Expropriation which Led to the Destruction of the Investment

68. I concur with Award's reasoning that the sequestration of the vessels was a breach of FET. Yet, as I will explain, I find the Award's reasoning flawed with respect to two interconnected points: (i) the Detention Order was in fact an expropriation, even though certain acts were temporary; and, that notwithstanding, (ii) the compensation provided under the Award for this breach fails to account for the circumstances of this case. Obviously, FET could still achieve its equitable result, if the damages awarded were to cover the full extent of the Claimant's injury, the remedy for expropriation.

69. The Award mentions two decisions on which its analysis of the Detention Order as a temporary expropriation is based: *LG&E v. Argentina*, and *Belokon v. Kyrgyz*.⁷⁶ The Award, referring to these two decisions, states that "Tribunals have considered a number of factors, including the temporal duration of the deprivation, and whether the deprivation was always intended to be temporary".⁷⁷ The Award then reasons that:

"Tribunals have been reluctant to find that a measure is expropriatory in circumstances where the **deprivation has not had long-term effect on the value of the investment**. As the tribunal in *LG&E v Argentina* expressed it, "[g]enerally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations".

⁷⁶ Award, ¶¶ 244-245.

⁷⁷ Award, ¶ 245.

70. The Award concludes that: “The Claimant was deprived of some of the vessels for a short period of 4-5 months, and there is no evidence that the deprivation **was ever intended** to be permanent. Further, the Claimant recovered the vessels.”⁷⁸

71. The Award’s reliance upon the intention that an expropriation be intended to be permanent is unsupported by the authorities on which it relies,⁷⁹ while numerous decisions have recognized that under international law the intent to expropriate is not a precondition or even a decisive factor.⁸⁰ The focus is the effects of the measure, not the intent of the State.

72. As I will explain, the record shows that the impact of the measure on the investment was devastating. But even if one accepts that the cause and context may be taken into account, per the tribunal in *LG&E v. Argentina*, then in this case, as the Award explains, the State sequestered the property to ensure the operation of the State-owned PEMEX, stringing the investor along with made-up requests that it prove ownership.⁸¹

73. Even if some tribunals, as the Award claims, have “considered a number of factors, including the temporal duration of the deprivation, and whether the deprivation was always

⁷⁸ Award, ¶ 246.

⁷⁹ The only decision which may remotely relate to considering whether “the deprivation was always intended to be temporary” is *Belokon v. Kyrgyz*. But there the issue was the continuing administrative sequestration of the bank, with “no assurances by the Respondent that this temporary administration will soon be at an end.” (*Belokon v. Kyrgyz*, Award, ¶ 207 (Oct. 24, 2014)). *LG&E v. Argentina* mentioned its opinion that it should consider the context and purpose of a measure to balance “both of the causes and the effects of a measure” (*LG&E v. Argentina*, ICDIS Case No. ARB/02/1, Decision on Liability, ¶ 194 (Oct. 3, 2006)).

⁸⁰ See, e.g., *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 111 (Aug. 30, 2000); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 270 (Feb. 6, 2007); *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, ¶ 304 (Mar. 1, 2012); *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, ¶ 147 (Nov. 3, 2008); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 7.5.20 (Aug. 20, 2007).

⁸¹ Award, ¶¶ 259-260.

intended to be temporary”,⁸² the Award seems to treat these factors as dispositive, disregarding the decision whose dictum it quoted. For example, the quote from *LG&E v. Argentina*, conditions temporary expropriation on “unless the investment’s successful development depends on the realization of certain activities at specific moments that may not endure variations”. Given the consequential nature of expropriation, its “intended” effect cannot be decisive.

74. In fact, the timeline strongly suggests that the investment was lost, in large part, due to the sequestration of the vessels. For one thing, duration has to be treated realistically; it was not simply a matter of receiving the vessels on the day of their release, wiping down the wheelhouses and returning them immediately to service. The tolerable duration of expropriatory measures which produce significant injury for complex investments which coordinate equipment and assembly of crew, schedules with other operators, etc. may be much shorter.

75. In point of fact, this was an expropriation: there was a clear intent by the State to deprive the investor of the property for the State’s benefit; the deprived property was a substantial part of the investment; and while the retention of the vessels by the State might have been temporary, its deprivatory effect, a direct consequence of the sequestration, proved to be permanent: the investment did not continue to operate during this period of time nor was POSH able to restart its operations in Mexico afterwards.

76. The Award explains that: “The SEMCO Vessels were released on June 16, 2014. GOSH’s Vessels and the SMP Vessels were released on July 16, 2014.”⁸³ What happened after that is an important part of the story. Less than 10 days after the release of the GOSH Vessels, in an internal

⁸² Award, ¶ 246.

⁸³ Award, ¶ 94.

POSH correspondence, Geoffrey Yeoh wrote to Gerald Seow that “We are bleeding in Mexico and any work for our vessels, even short term in nature will help stem our losses”, to which Gerald Seow responded that:

“Geoff,

The reality is that GOSH has no more equity left.

Therefore the value of GOSH will be the market value of the vessels over the debt to Posh.

There is no goodwill left, since the contracts are no longer there.

Assuming the market value is \$20 million each, then the value of Gosh will be about \$\$120m less debt of \$110 million, which works out to \$10 million.

This \$10 million will become zero in the next few months, which means Gosh has zero value??

Brgds”⁸⁴

77. This communication, dated July 25, 2014, is clear. After the Detention Order, GOSH had “no more equity left”. As the contracts were terminated, pursuant to the Diversion Order as I explained above, it seems that POSH expected that the value of its investment in GOSH above debt would become zero. The investor was denied the use of the property through which its investment generated revenue for a prolonged period of time and the existing contracts were terminated because an organ of the Respondent diverted any receivables to the State’s accounts. It is therefore not surprising that the Detention Order left GOSH with no equity.

78. To recall, the decision in *LG&E v. Argentina*, on which the Award relies, opined that an expropriation must be permanent “unless the investment’s successful development depends on the realization of certain activities at specific moments that may not endure violations”. Whether or not such limitation is correct, it is clear that in this case depriving the investor of the ability of using its revenue-generating property for this period, had a devastating effect on the entire

⁸⁴ Email from G. Seow to G. Yeoh et al., July 25, 2014 [Exhibit C-189] [emphasis added].

investment. The Award says that “the Claimant recovered the vessels” and that “there is no evidence that the deprivation was ever intended to be permanent”.⁸⁵ Yet consequence, not intention, defines the scope of expropriation: The pertinent question is not whether the deprivation was intended to be permanent but rather whether it had a permanent effect. The events of this case indicate that it did.

79. As mentioned above, at the end of the detention period, the investor’s prime investment had no more equity left. This was the result of two actions taken by the Respondent. First, the Respondent sequestered the prime revenue generating property of the investor for the purpose of protecting the operations of the State-owned PEMEX.⁸⁶ Second, the Respondent diverted any payments from work performed by the sequestered property to the State’s accounts rather than the Irrevocable Trust. The second act of the Respondent immediately led to the investor’s decision to withdraw the vessels from the existing contracts; the investor could not have been expected to do otherwise. Deprived of its only means to generate profit and sustaining the costs of the vessels during the Detention Period, is it surprising that the investment had no more equity left? Is it surprising that without equity the investor was unable to restart the venture?

80. In fact, POSH attempted, in an effort to mitigate its injury, to restart the investment in negotiations with PEMEX and SAE in the several weeks following the release of the vessels on

⁸⁵ Award, ¶ 248.

⁸⁶ Award, ¶¶ 258-261.

July 16, 2014,⁸⁷ only to have its efforts blocked by another decision by an organ of the Respondent on August 15, 2014.⁸⁸

81. Without explanation, the Award treats the investor's only losses from the Detention Order as those limited to the detention period itself. That is a mistake. The Mexico-Singapore BIT is silent on the specific measure of compensation to be paid. Yet that fact does not mean that there is a vacuum. As I will further elaborate below, were the Detention Order deemed an expropriation, as I believe it should have been, the BIT provides a standard of compensation of a lawful expropriation.⁸⁹ Professor Salacuse provides a succinct formulation of which there are many, many more: "Customary law therefore requires a tribunal to award 'full compensation' to a claimant for the injuries to an investment caused by a state's treaty violations, to seek 'to wipe out all the consequences' of that state's illegal acts, and to place the claimants 'in the situation which would, in all probability, have existed' if that state had not committed its illegal acts."⁹⁰

82. The Award seems to believe that by awarding POSH the loss associated with only the detention period, it would "wipe out all the consequences" of the illegal Detention Order. As I have explained, that is simply wrong. According to the Award, during this period of time the investment lost US\$ 6.7M (I will return to this number below).⁹¹ By depriving the investor of this revenue, leaving its main subsidiary, GOSH, without any equity at the end of the Detention Period,

⁸⁷ See, e.g., Email from G. Seow to G. Yeoh et al., July 25, 2014 [Exhibit C-189]; Email from J. Phang to G. Seow et al., July 18, 2014 [Exhibit C-130]; Email from J. Phang to G. Seow et al., August 20, 2014 [Exhibit C-188].

⁸⁸ Reply, ¶ 310; Insolvency Court decision (granting the injunction requested by SAE), August 15, 2014 [Exhibit C-192].

⁸⁹ Mexico-Singapore BIT, Art. 6(2) [Exhibit CL-1].

⁹⁰ SALACUSE, *supra* note 63, at 554. Quoting from the *Factory at Chorzow* judgment of the Permanent Court of International Justice.

⁹¹ Award, ¶ 268.

the Respondent created a situation from which the investment did not recover. Thus, by compensating the investor solely for the “income generated by the vessels during the detention periods”,⁹² (or in fact for only parts thereof), the Award does not “wipe out all the consequences” of the illegal Detention Order. Even as a violation of FET, if that focus were deployed, the compensation must include losses associated with the loss of investment itself. The necessary compensation is even clearer when the Detention Order is treated as an expropriation.

83. The Award recognizes that the investor’s property, *i.e.*, the vessels, were taken by the Respondent to protect the operations of the State-owned PEMEX. Article 6 of the BIT defines an expropriation broadly, including direct and indirect measures tantamount to expropriation:

“Neither Contracting Party may expropriate or nationalize **an investment** either **directly or indirectly** through **measures** tantamount to expropriation or nationalization”.

An “investment” is defined very broadly in the BIT, and includes, besides the examples quoted above, also:

“(e) interests arising from the commitment of capital or other resources in the Area of a Contracting Party to economic activity in such Area, such as under:

- (i) contracts involving the presence of an investor's property in the Area of the other Contracting Party, including turnkey or construction contracts, or concessions;
- (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; or
- (iii) licenses, authorizations, permits, and similar instruments;

(f) movable or immovable property, and related rights such as leases, mortgages, liens or pledges, acquired in the expectation or used for the purpose of economic benefit or other business purposes;”

⁹² Award, ¶ 261.

84. The broad language of the BIT provides for various ways in which the Detention Order can be viewed as an expropriation. First, the lost revenue from the existing contracts was an “interest[] arising from the commitment of capital or other resources”, from “contracts involving the presence of an investor's property in the Area of the other Contracting Party”. Second, the vessels themselves were movable property “used for the purpose of economic benefit or other business purposes”. As explained above, the Detention Order also produced indirect effects on other assets of POSH which sustain the definition of a protected investment. These include enterprises owned by the investor (BIT Article 1(7)(a)), and rights related to the movable property such as, for instance, mortgages (BIT Article 1(7)(f)). But the Detention Order also denied the subsidiaries the property required to conduct business and repay their loans from POSH (BIT Article 1(7)(d)).

85. It may be true that from an *ex-post* perspective, it is challenging to ascertain whether the additional US\$ 6.7M (assuming that the Award’s reliance upon Dr. Alberro is justified)⁹³ would have allowed POSH to restart the investment successfully. For one, the Diversion Order, itself an expropriation as I explained above, would have probably led to the termination of the existing contracts irrespective of the sequestration of the vessels. Second, the Blocking Order, itself hardly a treatment which is fair or equitable, would have been passed regardless, thus blocking POSH’s ability to substitute OSA in the contracts with PEMEX. But such perspective disregards the rules under the BIT. Article 6(2)(a) of the BIT specifically provides that compensation for an expropriation be calculated *ex-ante* from the date of the expropriation; that is the valuation date. Compensation for a lawful expropriation must:

“be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not

⁹³ See further *infra*.

reflect any change in value because the intended expropriation had become publicly known earlier.”⁹⁴

86. Whether the *measure, i.e.*, the Detention Order was temporary, its effects on the value of the investment were long-term and devastating. There is thus no need to play the “what if” game with respect to compensation for expropriation. In an analogy from creeping expropriation, the compensation to the Claimant should be calculated based on the value of the investment as of the date of the Detention Order.

87. The fact that the Diversion Order contributed to GOSH’s lack of equity after the vessels were released, may not undermine this conclusion. Once the Respondent expropriated the investor’s claim to money and diverted the payments from the Irrevocable Trust, it created a situation in which the investor had no alternative but to terminate the contracts. To insist that POSH should have kept its then sequestered vessels, performing the OSA contracts, knowing that it would not receive any payments would have been absurd. Because of the Diversion Order POSH would not have received any income from the contracts even if it had not terminated them. Whether the Diversion Order was a contributing factor, it is a factor wholly attributable to the Respondent, and, again to recall, the consistency or inconsistency of that measure with domestic law is immaterial.

88. Therefore, whether in combination with the Diversion Order or even of its own accord, compensation for the sequestration of the vessels should be *ex-ante* and based on the fair market value of the investment before the Detention Order was issued.

89. Two final points on compensation. First, the Award relies for compensation on the calculation done by Dr. Alberro without explaining why it found it more accurate than the Versant

⁹⁴ Mexico-Singapore BIT, Art. 6(2)(a) [Exhibit CL-1].

report, *e.g.*, with respect to the different operating costs.⁹⁵ Second the Award fails to adjust that compensation to its decision.⁹⁶

90. The compensation for the detention period for the six GOSH vessels (Caballo Argentó, Caballo Babieca, Caballo Copenhagen, Caballo Monoceros, Caballo Scarto, Don Casiano) was calculated at only 59 days instead of 120 days, while for the vessels with expired contracts, it was 80% of the total detention period (based on a reduction the Award accepts).⁹⁷ Both experts excluded from compensation for the detention period losses incurred during the time the vessels were servicing PEMEX, counting only lost hires after the Diversion Order which led to the contracts' termination. That would have made sense, as the losses for the period between March 16, 2014 and May 16, 2014, were included in the claim for the Invex Trust, and counting them here would have been double counting. But having rejected the claim based on the Diversion Order, the Award should have revised the compensation for the Detention Order.

91. As POSH indicated, it only kept the vessels in the contracts and performing work for PEMEX during this period because the payments were to be sent to the Irrevocable Trust.⁹⁸ As a contemporary, May 12, 2014, email from Captain Seow makes clear:

“Since 1 March 2014, after we learnt that OSA has been taken over by SAE, the Judicial Administrator of Mexico, we have been in discussions with Pemex and SAE on the outstanding that OSA owed to our companies in Mexico. We met them for the first time since [*sic*] **12 March 2014, and since then have been meeting them regularly**, providing to them information on the outstanding debt owed by OSA to us, **and also to request for the redelivery of our vessels. SAE requested that we should continue to operate the vessels chartered to OSA, that are serving Pemex, and assured us that since the payments rights had been**

⁹⁵ Versant Second Report, ¶¶ 125 – 131; Dr. Alberro Second Report, ¶¶ 87 – 92.

⁹⁶ Dr. Alberro Second Report, ¶ 24 Table 1.

⁹⁷ Award, ¶ 263.

⁹⁸ *See, e.g.*, Email from G. Seow to R. Granguillhome Morfin, May 12, 2014 [Exhibit C-148].

assigned to an irrevocable trust account, our revenues for these vessels is assured.”⁹⁹

Such practice by the Respondent is consistent with its other contemporary practice, and specifically its sequestration of the vessels to ensure their servicing of PEMEX while stringing the investor along with the pretext that it only had to prove ownership to secure their release. Thus, SAE created a reasonable expectation on the part of POSH with respect to performance of the service in this period and their assurance under the trust arrangement, only to flip and ask the Insolvency Court to stop the payments after the services were provided:

“The payment rights of the 6 vessels had been assigned to an irrevocable Trust Account in 2013, and as such our revenue for these vessels should have been assured.

Unfortunately, unbeknownst to us, SAE requested the Third District Court hearing the bankruptcy proceedings to order Pemex Exploracion y Produccion ('PEP') to stop payment to the trusts of the collection rights over the PEP Contracts assigned by OSA to the Trust, and instead to pay directly to SAE/OSA under the grounds that the funds are required to effect payments to OSA's workers and to maintain the company in operation.”¹⁰⁰

92. On SAE’s request, the Mexican Insolvency Court, in effect, nullified the trust arrangement retrospectively, diverting any outstanding payments to the State’s accounts rather than the Irrevocable Trust. As far as those outstanding amounts were for services provided by the vessels during the unlawful detention period, those ought to be included in the compensation and there is no risk of double counting, if one were to reject the claim concerning the Detention Period (on which I disagree with the Award). The Award cannot have it both ways. If the decision to retroactively divert outstanding amounts was unlawful under Mexican law, then even under the

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Award's analysis it should sound in the BIT. But if it were lawful, and the assignment of receivables was, in effect, nullified retroactively, Mexico should not be allowed to hide behind the arrangement and avoid compensating the investor for losses incurred during the unlawful detention period due to this arrangement. It is clear that should POSH have known that SAE's assurances on the trust arrangement were false, it would not have kept the vessels servicing PEMEX between March 16, 2014, and May 16, 2014, but rather withdrawn them immediately, or perhaps even before then (the first meeting with SAE seems to have been on March 12, 2014 per the email above).

93. Even though the BIT is silent on the standard for compensation for a breach of FET, as I explained above, the standard for expropriation is quite clear. If, as I suggest, the Detention Order is viewed as an expropriation, then the fair market value must be traced back to the moment of expropriation, *i.e.*, March 16, 2014. That is the evaluation date, not the withdrawal of the vessels on May 16, 2014. This includes the actual hires lost for the period between March 16, 2014 and May 16, 2014, and the potentially lost hires from May 17, 2014, until the vessels' release. As I explained above, it is clear that the loss from the Detention Order extended beyond the mere loss of revenue during this time, but even if limited to this period, there is no justification for excluding half the period.

94. Viewed as an expropriation, it is true that when tracing the loss from the evaluation period one needs to exclude the actual cash flow and the value recovered by the investor. But that only indicates that the actual payments received by POSH for services during the detention period must be excluded. Yet because the Respondent diverted the payments retroactively for the services provided during the unlawful detention period between March 16, 2014 and May 16, 2014, only those actually paid into the Invex Trust before the Diversion Order should be excluded. Funds

which were diverted should not be excluded from the fair market value valuation as of March 16, 2014.

95. Although my analysis is in terms of expropriation, it could be applied to an FET analysis as well. To use a different valuation date for FET, would allow Mexico to reap the benefits of its unfulfilled assurances to POSH, on the basis of which POSH continued to service PEMEX, irrespective of the unlawful Detention Order. The Respondent, it will be recalled, sequestered the vessels to service PEMEX while stringing the investor along under the pretext that it must prove ownership of the vessels to release them. It led the investor to continue to service PEMEX by providing assurances that its revenue was assured through the trust only to go behind the investor's back and have another one of its organs divert the payments retroactively. Even then it continued sequestering the vessels under the same pretext, until the investment was destroyed. Even if the Diversion Order was not a breach, which I believe it was, the compensation for the Detention Order should include the loss of investment, and at the very least, the loss incurred through the entire unlawful detention period.

96. With respect to the Claimant's claims concerning the Detention Order and compensation, I therefore concur in part and dissent in part. I dissent on the rejection of the expropriation claim with respect to the Detention Order, but concur that the Detention Order was a breach of FET. I dissent on the compensation: (1) the compensation for the Detention Order should extend to include the entire period; (2) damages from the Detention Order should include the long-term effects of the Detention Order on the value of the entire investment.

Concurring in part and dissenting in part,

[Signed]

Prof. W. Michael Reisman
Arbitrator

Date : January 7, 2022